

BRB No. 05-0984 BLA

ESTILL L. KIRBY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 05/30/2006
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor, Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (04-BLA-5584) of Administrative Law Judge Robert L. Hillyard rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case involves an initial claim filed on October 18, 2002. Decision and Order at 2; Director's Exhibit 2. After crediting claimant with one-half year of qualifying coal mine employment, the administrative law judge found that although the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), claimant did not establish that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c), or that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that he did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant alleges further that the Department of Labor failed to provide him with a complete and credible pulmonary evaluation sufficient to substantiate his claim. The Director, Office of Workers' Compensation Programs (the Director), responds urging affirmance of the administrative law judge's denial of benefits and also asserting that a remand for a complete pulmonary evaluation is not warranted in this case.<sup>1</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to 20 C.F.R. §718.204(b)(iv), claimant asserts that in addressing the issue of total disability, the administrative law judge is required to consider the exertional requirements of claimant's usual coal mine work in conjunction with a physician's findings regarding the extent of any respiratory impairment. Claimant's Brief at 3-4, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). The only specific argument claimant sets forth, however, is that:

The claimant's work included being a coal truck driver. In can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, it is rational to conclude that the claimant's condition prevents him from engaging in his usual

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<sup>1</sup> We affirm as unchallenged on appeal the administrative law judge's findings that claimant has one-half year of coal mine employment and did not establish that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.

Claimant's argument is without merit. A statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83 (1988). Moreover, the administrative law judge permissibly chose to give "great weight" to Dr. Mettu's "well-reasoned" opinion that claimant "does not suffer from a significant impairment and that he retains the respiratory functional capacity to do the work of a coal miner," because the opinion was supported by claimant's pulmonary function study. Decision and Order at 8, 9; *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). Consequently, it was unnecessary for him to compare the exertional requirements of claimant's usual coal mine employment as a truck driver to the medical opinions. *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985).

We also reject claimant's argument that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment, because an administrative law judge's findings must be based solely on the medical evidence of record. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004). Therefore, we affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Claimant next contends that because the administrative law judge did not credit Dr. Simpao's opinion concerning the etiology of claimant's pneumoconiosis at Section 718.203(c) provided by the Department of Labor, "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 2. The Director responds that the administrative law judge's decision to discount Dr. Simpao's opinion on this issue stemmed from an incorrect coal mine employment history that claimant provided to the doctor. The Director argues further that, in any event, "there is no need to remand this case to the district director [for] a new pulmonary evaluation" because the record does not establish that claimant is totally disabled. Director's Brief at 3.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-

102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

The record reflects that Dr. Simpao conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. Director's Exhibit 14; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). On the issue of the cause of claimant's pneumoconiosis, the administrative law judge chose to accord "little weight" to Dr. Simpao's opinion because it was based on a coal mine employment history of forty-five years. Decision and Order at 7. Thus, contrary to claimant's contention, the administrative law judge did not give the opinion no weight. Therefore, there is no merit to claimant's contention that the administrative law judge's analysis of Dr. Simpao's opinion establishes that the Director violated his duty to provide a complete and credible pulmonary evaluation. *Cf. Hodges*, 18 BLR at 1-93. Moreover, the administrative law judge properly found that claimant is not totally disabled. Thus, there is no need to remand this case for an updated pulmonary evaluation on the issue of the cause of claimant's pneumoconiosis in any event.

Because claimant did not establish the presence of a totally disabling respiratory or pulmonary impairment, a requisite element of entitlement in a miner's claim pursuant to 20 C.F.R. Part 718, we affirm the denial of benefits. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27.

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge